IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 35 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

VINODBHAI BIKHABHI HARIJAN

Versus

ELECTION OFFICER AND ADDITIONAL TALUKA DEV OFFICER

Appearance:

MR PARESH M DAVE for Petitioner

MR SAMIR J.DAVE A.G.P. for the respondents

CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 15/01/98

ORAL ORDER

By means of filing this petition under Article 226 of the Constitution, the petitioner has prayed to issue a writ of mandamus or any other appropriate writ,

direction or order to set aside order dated December 31, 1997 passed by respondent no.1 by which nomination paper presented by the petitioner for contesting election as a member of Vadsala Gram Panchayat, is rejected on the ground that name of the petitioner does not appear at serial no.533 in the electoral roll prepared on August 4, 1997.

2. The petitioner is a resident of village Vadsala. The State Election Commission issued notification in Official Gazette for holding election of Sarpanch and members to Vadsala Gram Panchayat. On December 12, 1997 a public notice was published by the Returning Officer i.e. respondent no.1 of the intended election in Form 3 inviting nominations of candidates for said election. In pursuance of public notice, the petitioner presented nomination paper on December 29, 1997 to contest election as a member of said Panchayat. The respondent no.1 rejected nomination paper of the petitioner on December 31, 1997 on the ground that name of the petitioner did not appear at serial no.533 in the list of voters prepared on August 4, 1997. The said decision is produced by the petitioner at Annexure-B to the petition. The petitioner has averred in the petition that whole basis of the impugned decision is factually incorrect,inasmuch as the petitioner's name appears at serial no. 533 in the list of voters prepared on September 15, 1997 as well as at serial no.45 in the list of voters prepared on August 4, 1997 and, therefore, the impugned decision is liable to be set aside. What is claimed in the petition is that before rejecting nomination paper presented by the petitioner, no inquiry worth the name as contemplated by Rule 15(2) of the Gujarat Panchayats Election Rules, 1994 was made by the Returning Officer and as the impugned decisionis contrary to the provisions of the Gujarat Panchayats Act, 1993 as well as election rules framed thereunder, the same is liable to be set aside. Under the circumstances, the petitioner has filed present petition and claimed relief to which reference is made earlier.

3. The petition was placed for admission hearing before Court (Coram: M.S.Shah,J.) on January 5, 1998 and after hearing the learned Counsel for the petitioner, notice was issued making it returnable on January 8, 1998. On January 8, 1998, following order was passed by the Court ;-

"Mr. M.M.Patel,ld. A.G.P. states that the name of the petitioner appears at sr. no.533 in the list dt. 15.9.1997. However, since the

Returning Officer is not present in the Court today, he will seek instruction for making appropriate statement on 12.1.1998.

S.O. to 12.1.1998."

4. Mr. P.M. Dave,learned Counsel for the petitioner submitted that name of the petitioner appears at serial no.533 in the latest list of voters which was prepared on September 15, 1997 as well as at serial no. 45 in the list of voters which was prepared on August 4, 1997 and, therefore, the impugned decision being factually incorrect,the petition should be entertained. It was pleaded that before passing the impugned order, no summary inquiry as contemplated by the Gujarat Panchayat Election Rules, 1994 was made by the Returning Officer and, therefore, the relief claimed in the petition should be granted. What was highlighted by the learned Counsel for the petitioner was that election petition, if filed by the petitioner, is bound to be allowed and, therefore, the Court should not refuse to entertain the petition on the ground that alternative effective remedy of filing election petition is available to the petitioner. It was also contended that the reason for which nomination paper presented by the petitioner is rejected, is not substantial at all and is technical one in nature and, therefore, the impugned decision deservesto be set aside. In support of his submissions, learned Counsel placed reliance on the decisions rendered in (1) Special Civil Applications no. 8509, 8543 & 8743 of 1992 decided by Court on December 24, 1992 ,(2) Inder Chand Jain vs. The Institute of Chartered Accountants of India and another, AIR 1992 Bombay 31, (3) Smt. Navuba Gokalji Chavda & Ors v. The Returning Officer & Ors., 1982(2) G.L.R. 397, and (4) (Shri) Sisodia vs. V.N.Maida and another, 1987(2) G.L.H.(U.J.10).

5. Mr. S.J.Dave, learned Counsel for the respondents submitted that alternative effective remedy of filing an election petition under section 31 of the Gujarat Panchayats Act, 1993 is available to the petitioner after declaration of result and, therefore, present petition should not be entertained by the Court. In support of his submission, leanred Counsel relied on the decisions rendered in the cases of (1) Ismail Noormohmad Mehta & Ors. v. State of Gujarat & Ors., 1996(1) G.L.R. 549, and (2) Election Officer & Ors. v. Dharamshibhai Muljibhai, 1997(1) G.L.R. 589.

6. In view of rival submissions advanced at the Bar, the question which falls for consideration of the Court is whether petition under Article 226 of the Constitution

should be entertained if alternative effective remedy of filing election petition after declaration of result of election is available to the petitioner ? The noraml rule is that once an election process has been set in motion, the High Court would not be justified in interfering with the said process if dispute sought to be redressed is covered by an election dispute and remedy of filing election petition for redressal of said dispute is available under relevant law. In the case of Inder Chand Jain (supra), nomination of candidates for election of 8 seats of members of Council of Institute of Chartered Accountants of India were rejected by the competent authority. That decision was challenged by way of filing a writ petition. On behalf of the Institute of Chartered Accountants of India it was pleaded that as there was an alternative efficacious remedy available to the petitioner, petition under Article 226 of the Constitution was liable to be rejected. The Bombay High Court overruled the said preliminary objection raised to the maintainability of the petition because the Court was of the view that, (i) the dispute raised was in respect of election of a body of professionals and the strict rules applied in respect of holding of election under the Representation of the People Act or other statutory authority were not applicable, (ii) non-consideration of the claim advanced in the petition was likely to lead to multiplicity of litigation, (iii) sub-section (2) of Section 10 of the Chartered Accountants Regulations did not create a permanent forum for deciding the election disputes, and (iv) the mode provided for appointment of a Tribunal was not only time consuming, but onerous one, as the Council was required to bear expenses of election dispute. It is true that in the said case, Court has held that in order to save undue expenses, a petition challenging the order by which nomination paper is rejected, can be entertained, but reading para-3 of the impugned judgment,it becomes evident that for the reasons which have been mentioned hereinabove, Court was inclined to entertain the petition. It is relevant to notice that decision of Bombay High Court is set aside by the Apex Court in Institute of Chartered Accountants of India and another v. Inder Chand Jain, 1992 Supp.(1) SCC 433. On totality of the facts of the case, I am of the view that the principles laid down in the decision rendered by Bombay High Court are not applicable to the facts of the present case. Again, in Special Civil Applications no. 8509, 8543 & 8743 of 1992, decided on December 24, 1992, it is held in para-4 of the said judgdment as under :-

"It is true that once the election process has

> started, it should be allowed to be completed without any interference by the Court and ordinarily the remedy is by way of election petition challenging the election. However, the question of rejection of nomination papers is such a question that if it can be resolved in proper time without disturbing the election not only for one seat, but for all the seats of that ward are not put into and do not get set aside. However, if it is not possible to redress this grievance in time, the Court should refrain from interfering with the election process."

Even in the above referred to decision, the principle has been reiterated that once election process has started, it should be allowed to be completed without any interference by the Court and ordinarily the remedy is by way of election petition challenging the election. It is true that in the said decision, it has been held that if the question of rejection of nomination papers can be resolved in proper time without disturbing the election, Court should make attempt to redress the grievance. However, in my view, no absolute proposition of law has been laid down that if question of rejection of nomination paper can be resolved without disturbing the election, petition must always be entertained and appropriate relief should be granted. In Boddula Krishnaiah and another v. State Election Commission, A.P. and others, A.I.R. 1996 S.C. 1595, it is clearly ruled that once an election process has been set in motion, the High Court would not be justified in interfering with the same because the object of relevant Act, the Rules made thereunder and Article 243-O is to see that the election process to the Gram Panchayat, once is set in motion, the process should be culminated in the declaration of the result of election and any dispute in relation to conduct of the election should be dealt with by the appropriate Tribunal in accordance with law. When High Court directs the Returning Officer to accept nomination of a person, it is wrong to say that election process is not interfered with. The direction by the High Court to accept nomination of a person is bound to have effect on election process and to some extent election process stands modified by the direction. In no decision, the Supreme Court has held that the High Court should try to redress the dispute raised in a petition under Article 226 if attempt to redress grievance does not interfere with process of election. The principle on which dictum of Apex Court is based, is that if dispute sought to be redressed is covered by an election dispute, it should be got redressed by filing an election

petition. Even otherwise, the petitioner has averred that Returning Officer has rejected nomination papers presented by six other candidates also on the ground that their names did not appear at the serial numbers indicated in the voters' list prepared on August 4, 1997. Whether names of the persons whose nomination papers are rejected, appear at particular serial numbers or not can be decided only by launching a detailed inquiry. The question whether the Returning Officer was justified in rejecting nomination papers can also be decided after parties are permitted to lead evidence in support of their respective claims. Under the circumstances, it is not possible to redress the grievance made by the petitioner in the present petition in time as contemplated by the decision rendered in Special Civil Application no. 8509/92, decided on December 24, 1992 and, therefore, no relief can be granted to the petitioner on the basis of so-called principle laid down by the High Court in the above referred to unreported decision. In Smt. Navuba (supra) on the peculiar facts of the said case it was found that the remedy of filing election petition under section 24 of the Gujarat Panchayats Act, 1961 was not available to the petitioner, as the nomination paper of the petitioner who was sole candidate at the election, was rejected. Therein also the Court has reiterated well settled principle that if normally alternative remedy is available, remedy under Article 226 cannot be granted. However, the Court made departure from the well settled principle because except petitioner, there was no other candidate in the field and remedy of election petition was not available to the petitioner. In my opinion, therefore, the ratio laid down in the said case is not applicable to the facts of the case at all. In the case of (Shri) Sisodia, nomination paper was rejected on the ground that incorrect serial number in the list of voters was stated. The High Court found that the said mistake was not a substantial defect and, therefore, direction was given to the Returning Officer to include petitioner's name as a contesting candidate for the ward concerned. A bare reading of the said decision makes it abundantly clear that the point whether petition under Article 226 should be entertained if alternative efficacious remedy of filing election petition is available, was never considered. Under the circumstances, even this decision is of little help to the petitioner. However, the point whether petition at this stage should be entertained or not is squarely covered by the Division Bench judgment of the High Court rendered in the case of Ravjibhai Bhikhabhai Patel v. Chief Officer,Bilimora Nagar Palika & Ors. 23(1) G.L.R. 611. In the said decision, the

Division Bench has held that when remedy by way of election petition can be resorted to, direct petition under Article 226 or 227 of the Constitution would not normally be maintainable. The Division Bench has laid down various principles applicable to such case. They read as under :-

(1) Though the extraordinary jurisdiction of High Court under Articles 226 and 227 of the Constitution is very wide, the court should be slow in exercising the said jurisdiction where an alternative efficacious remedy under the Act is available. However, if the impugned order is an ultra vires order, or is a nullity as being ex-facie without jurisdiction, the question of exhausting the alternative remedy could hardly arise.

(2) It is well recognised on principle and in authority that where a right or liability is created by a statute which gives a special remedy for enforcing it only, the remedy provided by that statute must be availed of.

(3) The right to vote or stand as a candidate at the election is not a civil right but is a creature of a statute or a special law and must be subject to limitations imposed on it. If the legislature entrusts the determination of all matters relating to election to a special tribunal, and invests it with a new and unknown jurisdiction, that special jurisdiction alone could be invoked for enforcement of that right.

(4) In matters of election disputes, the court should refuse to exercise jurisdiction under Article 226 of the Constitution of India when the statute conferring right to vote or stand at the election prescribes a statutory remedy embracing the disputes pertaining to all aspects of the entire process of election.

(5) Merely because the challenge is to the plurality of returned candidates or for that matter to the entire election, it is fallacious to urge that it can be only redressed by a writ petition.

(6) It is well recognised principle and a matter of public importance that elections should be concluded as early as possible according to the time schedule and all controvercial matters as well as disputes arising out of the elections should be postponed till after the elections are over so as to avoid an impediment or hindrance in the election proceedings. In other words, there is a provisional finality in the matters pertaining to the various stages of elections.

(7) The bar of estoppel cannot be pleaded against a person challenging the election merely because he takes part in the said election by standing as a candidate or by exercise of his right of franchise therein especially when the impugned election is patently illegal and void ab initio due to the fact such as it being held pursuant to an ultra vires provision in a statute or the rules. There is no question of approbation and reprobation in case of a person standing or voting at the election, nor is there any bar of laches if he does not challenge such void election at the initial stage and approaches the court after the said election is over.

(8) Subject to the principle stated immediately hereinabove, if the entire conduct of a petitioner is so eloquent that he can be said to have acquiesced in the act which subsequently he has been complaining as a wrongful act, it may be one of the factors which the court exercising jurisdiction under Article 226 of the Constitution in a petition for a writ of quo warranto would bear in mind and may, in appropriate circumstances, refuse to exercise its extraordinary jurisdiction of granting a writ in the nature of quo warranto.

(9) The High Court, in exercise of its extraordinary jurisdiction under Article 226 of the Constitution,is not required to examine the question when the election is challenged on the ground of it being vitiated at its inception due to the fact such as it being held in pursuance of or in accordance with an ultra vires provision of the statute or the rules, as to whether the election of a returned candidate is materially affected at such election by operation of the ultra vires provision.

(10) Subject to the principles stated immediately hereinabove, an order to successfully challenge an election by a writ petition on the ground of breach of any mandatory provision contained in the Municipal Act or the Panchayat Act or the rules thereunder, it must be established that the election of the returned candidate was materilly affected thereby."

The aforesaid decision of the Division Bench, therefore, makes it clear that when effective remedy by way of an election petition is available, petition under Article 226 would not be maintainable. Even in Patel Kanchanbhai Mangalbhai & Anr. vs. Maneklal Maganlal Gandhi & Ors. 6 G.L.R. 200, the Court has considered scope and ambit of a petition under Article 226 against

an order rejecting nomination paper and has held as under :-

> "The word 'election' in sec.24 of the Gujarat Panchayats Act,1961, has a wider meaning which is used to connote the entire process culminating in a candidate being declared elected. If the returning officer has rejected a nominatioin paper otherwise than in accordance with the grounds mentioned in sub-rule(2) of Rule 14 of the Gujarat District Panchayats Election Rules, 1962, the rejection of the nomination paper would clearly amount to a breach or non-compliance with sub-rule(2) of Rule 14 and if in consequence of that, the result of the election has been materially affected- which it undoubtedly would be - the election can be set aside by the Civil Judge.
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> Reading sec.24 alongwith sub-rule(8) of Rule 14 and applying the rule of harmonious construction, it is clear that so far as the machinery of election is concerned, the decision of the Returning Officer regarding acceptance or rejection of nomination papers is final in the sense that it cannot be questioned until the election is completed, but when the election is completed, any aggrieved person may prefer an application before civil Judge under sec. 24 within fifteen days from the date if declaration of the result questioning the validity of the election on the ground that the nomination paper was improperly accepted or rejected in breach of or non-compliance with sub-rule(2) of Rule 14."

7. The submission that as no inquiry was made before rejecting nomination paper presented by the petitioner and as name of the petitioner appears at serial no.533 in the list of voters prepared on September 15, 1997, election petition, if filed, is bound to be allowed and, therefore, the petition should be entertained, cannot be accepted. A bare reading of order dated January 8, 1998 makes it abundantly clear that on that date, Returning Officer was not present and learned Assistant Government Pleader was to make appropriate statement after obtaining necessary instructions in the matter from the Returning Officer and, therefore, the matter was adjourned to January 12, 1998. Whether summary inquiry as contemplated by Gujarat Panchayat Rules is made or not,

is a question of fact and except bare averments made by the petitioner, there is nothing on record to suggest that no such inquiry was made by the Returning Officer. In the case of Ismail Noormohmad Mehta (Supra), the Court has clearly held that once election process commences, such process cannot be called in question, except by election petition.Similar view is taken by the High Court in the case of Election officer & Ors. (Supra). In the said case also, the Court was concerned with the question of legality of order by which nomination paper presented by the petitioner of that case for election as a member of the Panchayat was rejected. After examining scheme of Section 31 of the Gujarat Panchayats Act as well as provisions of Article 243-O of the Constitution and on review of law propounded by several decisions includidng those of Apex Court, the Court has held as under :-

> "As a matter of general principle, interference with an election process between the commencement of such process and the stage of declaration of the result by a Court, would not ordinarily be proper. Right to vote or stand for election to the office of members of the Panchayat is a creature of the statute. i.e. Gujarat Panchayats Act,1993 and it must be subject to the limitations imposed by it. Accordingly, the election to the office of a member of Panchayat can be challenged only according to the procedure prescribed by the Act and that is,by means of an election petition presented in accordance with the provisions of the Act and in no other way. The act provides only for one remedy, that remedy being an election petition to be presented after the election is over and there is no remedy provided at any intermediate stage. This aspect is emphasized and made beyond pale of any controversy by the Constitution (73 Amendment Act,1992), which has introduced Art. 243-O in Para-IX of the Constitution of India."

8. In my opinion, the principles laid down by the High Court in the cases of (1) Ravjibhai B.Patel, (2) Patel Kanchanbhai, and (3) Election Officer and others (supra) are squarely applicable to the facts of the present case and the petition at this stage cannot be entertained because the petitioner has an alternative efficacious remedy available under the Act of filing an election petition after the result is declared. In Ambabhai Popatbhai v. B.A.Pandey and others, 1989(2)

G.L.R. 1385, the appellant had prayed to quash order by which his nomination paper for the post of Sarpanch of Kapadiali Gram Panchayat was rejected by Returning Officer on the ground that the appellant had mentioned that his name was at serial no.107 of list of voters whereas as a matter of fact, it was at serial no.40. The petition was dismissed by learned Single Judge. While dismissing Letters Paten Appeal, the Division Bench has held that when nomination of a candidate is rejected by the competent authority, the remedy of such a person is to challenge the election as provided by law and a writ under Article 226 is not a proper remedy for directing the authority to accept nomination paper. It would not be out of place to refer to the decision of the Constitution Bench of Apex Court rendered in the case of N.P.Ponnuswami v. The Returning Officer, Namakkal Constituency, A.I.R. 1952 64. In that case, the appellant was one of the persons who had filed nomination papers for election to Madras Legislative Assembly from the Namakkal Constituency in Salem District. On November 28, 1951, the Returning Officer for that constituency took up for scrutiny the nomination papers filed by the various candidates and on the same day he rejected the appellant's nomination paper on certain grounds. The appellant thereupon moved the High Court under Article 226 of the Constitution praying for a writ of certiorari to quash the order of the Returning Officer rejecting his nomination paper and to direct the Returning Officer to include his name in the list of valid nominations to be published. The High Court dismissed appellant's petition on the ground that it had no jurisdiction to interfere with the order of the Returning Officer. In appeal, Apex Court has held as under :-

"The word 'election' has been used in Part XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature. The use of the expression 'conduct of elections' in Art. 324 specifically points to the wide meaning and that meaning can also be read consistently into the other provisions which occur in Part XV including Art. 329(b). The term 'election, may be taken to embrace the whole procedure whereby an elected member is returned, whether or not it be found necessary to take a poll. It is not used in a narrow sense".

The Apex Court has further held that law of elections in India does not contemplate that there should be two attacks on matters connected with election

proceedings,one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution and another after they have been completed by means of an election petition. What is emphasised by the Supreme Court is that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any Court. It is also emphasised in the said decision that under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question and if the ground on which an election can be called in question could be raised at an earlier stage and errors, if any, are rectified, there will be no meaning in enacting a provision of law under Article 329(b) and there will be no meaning in setting up a special tribunal to decide the election dispute. It is further stressed that this and other grounds cannot be urged in any other manner at any other stage and before any other Court. Again,in the case of Nanhoo Mal and ors. vs. Hira Mal and ors., A.I.R. 1975 S.C. 2140, to fill up a casual vacancy in the office of the President of the Municipal Board, Soron in the district of Etah in Uttar Pradesh, notices were issued by the District Magistrate to the members of the Board informing them that nomination papers should be filed in his office by September 26, 1974 and if necessary, the election would take place on October 1, 1974. The respondent no.1 had thereupon filed a petition under Article 226 of the Constitution challenging validity of the procedure adopted by the District Magistrate for holding the election and prayed for an order to the District Magistrate not to hold the election on October 1, 1974. The election programme was already notified in the U.P.Gazette. Though there was a prayer in the writ petition for an order to the District Magistrate not to hold election on October 1, 1974, the learned Judges who admitted the writ petition, had directed that election would be subject to the ultimate decision in the writ petition. Consequently the election had taken place and the first appellant was declared elected. Thereafter the respondent no.1 had filed an application for impleading the appellant no.1 and the Municipal Board as parties and also claimed a further relief for quashing the election proceedings that took place on October 1, 1974. The petition was allowed and the entire election proceedings relating to the election of the appellant no.1 as the President of the Municipal Board was set aside by High Court. While allowing the appeal, the Apex Court has

held as under :-

"We are of the opinion that the whole approach of the learned Judges of the High Court to this problem was mistaken. After the decision of this Court in N.P.Ponnuswami vs. Returning Officer, Namakkal Constituency, (1952) 3 SCR 218 there is hardly any room for Courts to entertain applications under Article 226 of the Constitution in matters relating to elections."

From the judgment of the Apex Court in the case of Nanhool Mal (Supra) it follows that the right to vote or stand for election to the office of Member of a Panchayat is a creature of the statute i.e.Gujarat Panchayats Act, 1993 and it must be subject to limitations imposed by it. The word 'election' in Article 243-O is used in a comprehensive sense as including the entire process of election commencing with the issue of a notification and terminating with the declaration of election of a candidate. An application under Article 226 challenging the validity of any of the acts forming part of that process will be barred. These are instances of original proceedings calling in question an election and will be within the prohibition enacted in Article 243-O. Therefore, election to the office of member of the Panchayat can be challenged only according to the procedure prescribed by the Act and that is by means of an election petition presented in accordance with the provisions of the Act and in no other way. The Act provides only for one remedy, that remedy being an election petition to be presented after election is over and there is no remedy provided at any intermediate stage. As an alternative effective remedy is available to the petitioner, the petition is liable to be rejected.

For the foregoing reasons, the petition fails and is summarily dismissed. Notice is discharged, with no order as to costs.

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patel